

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 291 of 1983

For Approval and Signature:

Hon'ble MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed : YES  
to see the judgements?
  2. To be referred to the Reporter or not? : NO
  3. Whether Their Lordships wish to see the fair copy : NO  
of the judgement?
  4. Whether this case involves a substantial question : NO  
of law as to the interpretation of the Constitution  
of India, 1950 of any Order made thereunder?
  5. Whether it is to be circulated to the Civil Judge? : NO

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PATEL RAJA JURJI

Versus

AHER PUNA LAKHA  
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Appearance:

MR MA SAPA for MR PV HATHI for Petitioner  
Respondent No. 1 served  
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CORAM : MR.JUSTICE J.R.VORA

Date of decision: 15/09/2000

ORAL JUDGEMENT

1. This Second Appeal came to be filed by appellant  
- original defendant against the judgment and decree of  
the learned District Judge, Junagadh, in Regular Civil  
Appeal No.155 of 1980 and thereby learned District Judge

allowed the appeal and set aside the judgment and decree of the court of Civil Judge (JD) at Keshod in Regular Civil Suit No. 131 of 1977.

2. As per the brief facts of the case, present respondents filed above mentioned Regular Civil Suit No. 131 of 1977 against present appellant stating that the plaintiffs owned a filed survey No.14 at village Nanjanvav and defendant - present appellant owned survey No. 11 and 13 in the very sim of village Nanjanvav. It was stated by the plaintiffs that their right of way to approach survey No. 14 is going across the field bearing survey Nos. 11 and 13. The suit was filed by the plaintiffs basing his claim of easement of way. It was stated that they enjoyed possession of field survey No. 14 for more than 20 years and used the suit way going between the field survey Nos. 11 and 13 owned by the defendant since then. It was a case of the plaintiffs that field survey No. 14 was purchased by them from one Maiya Lakhman Jodha vide document - Exh.22 in 1957. The said suit way is obstructed by defendant and, therefore, suit for the permanent injunction not to obstruct right of easement of way was filed by the plaintiffs on 15th April, 1977. Defendant - appellant denied right of way in toto. Learned Trial Judge after recording of the evidence and hearing both the sides, came to the conclusion that the suit was based on prescriptive period and plaintiffs could not show that the plaintiffs were using the right of way preceding two years before filing of this suit and, therefore, the trial court did not believe the case of the plaintiffs that they were enjoying the above said suit way by easement as pleaded and, therefore, the suit came to be dismissed by the trial judge vide his judgment and decree dated 18th October, 1980.

3. Being aggrieved, the plaintiffs filed a Regular Civil Appeal No. 155 of 1980 in the court of learned District Judge, Junagadh, who after hearing the parties, came to the conclusion that Appeal was required to be allowed and learned District Judge set aside the judgment and decree of the trial court dismissing the suit of the plaintiff. Learned District Judge decreed the suit in the terms of prayer contained in para 9 of the plaint Exh.1 and hence this Second Appeal by original defendant.

4. Following substantial questions of law were framed while admitting this Appeal by this Court :

(1) Whether the learned District Judge committed

substantial error of law in holding that the plaintiffs - respondents have been able to establish their easement right in relation to the suit field No. 14 on true interpretation of the various documents produced on record?

(2) Whether the learned Judge committed substantial error of law in making out a new case of easement of necessity when the same was not pleaded in the plaint and when the parties have not gone on trial?

(3) Whether the learned Judge committed a substantial error of law in relying upon the document Exh.22 which was not admissible in evidence under the provisions of the Indian Evidence Act?

(4) Whether the learned Judge committed a substantial error of law in setting aside the judgment and decree of the learned trial judge and in decreeing the suit?

5. Learned Advocate Mr. M.A.Sapa on behalf of learned Advocate Mr. P.V. Hathi was heard at length while though notice has been served upon the respondents, none appears on behalf of the respondents.

6. The main controversy which is raised on behalf of the appellant side is a document - Exh. 22 by which the plaintiffs stated to have purchased the field survey No. 14. Exh.22 is a document between Puna Lakha and Maiya Lakhman Jodha. Puna Lakha, who purchased the land is the plaintiff here while the vendor Maiya Lakhman Jodha was dead when the suit came to be filed. The document is a registered document. Objection was raised regarding execution of document and it was urged that mere registration of document is not conclusive proof and, therefore learned District Judge has wrongly relied upon this document. Learned District Judge erred in law and except this document there was no evidence according to appellant side that the suit was by way of easement was used by the plaintiffs.

7. This contention on behalf of the appellant was assessed with the substantial questions of law framed, it is clear that registration of document as aforesaid

affords a presumption regarding the execution of a document. Further the evidence of the plaintiffs that the executant of this document i.e. vendor had died and the plaintiffs Puna Lakha was also a signatory to this document has been examined as witness. Not only that Sec. 32(4) of the Indian Evidence Act provides that the statement of dead person is relevant when such person has given the opinion as to the existence of any public right or custom or matter of public or general interest, of the existence of which, if it existed, he would have been likely to be aware, and when such statement was made before any controversy as to such right, custom or matter had arisen. In document Exh.22, the Vendor of Survey No. 14 who died before controversy, made a statement that to approach field Survey No.14, there was way between Survey No.11 and Survey No.13. There is no reason to disbelieve this statement.

8. Now it is clear from the evidence of the plaintiffs that the suit was not based on sole ground of prescriptive easement, but the evidence disclosed that the right of way by easement was claimed also as customary easement in the nature. While this court perused the statement of executant of document at Exh.22, it is clear that as back as in 1957 executant of the document i.e. original owner of field survey No. 14 made a statement that there was a right of way of field survey No.14 from the western boundary of the field of Harji Kurji Jivraj which is a field bearing Survey No.13. The defendant i.e. present appellant has sought evidentiary support from document at Exh. 28, by which he has purchased field Survey No.11 and it was the contention that there is no existence of such right of way in the document at Exh.28. The learned District Judge who was right in holding that this confusing position arises because the owner of field Survey No.13 at present the appellant purchased field survey No.11 and adjoining field only in 1970 while the document at Exh.22 is executed in 1957.

9. For the aforesaid reasons, this court has no reason to take a different view than the view taken by the learned District Judge after evaluating the evidence on record. Therefore, the learned District Judge was right in holding that the plaintiffs i.e. present respondents had easementary right regarding the suit way nor learned District Judge has committed error of law in considering this right of way by way of easement of necessity nor learned District Judge committed error on relying upon the document at Exh.22. This court accepts the reasoning of the learned District Judge and,

therefore no further reasons are required to be recorded.

10. In this view of the matter, there is no substance in the Appeal, the same stands dismissed with no order as to costs.

(J.R. Vora, J.)

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p.n.nair